A

TRAN THI TAT v. PP

COURT OF APPEAL, PUTRAJAYA
UMI KALTHUM ABDUL MAJID JCA
HARMINDAR SINGH DHALIWAL JCA
STEPHEN CHUNG JCA
B [CRIMINAL APPEAL NO: T-05(M)-146-04-2017(VNM)]
8 JULY 2019

CRIMINAL PROCEDURE: *Appeal – Appeal against conviction and sentence – Accused detained at airport – Bag carried contained 1669.8g of methamphetamine* C *– Accused found guilty, convicted for offence and sentenced to death – Whether prima facie case successfully established – Whether accused in custody and control of bag – Whether accused had knowledge of drugs found in bag – Whether conviction and sentence safe – Dangerous Drugs Act 1952, ss. 39B(1), 37(da)*

D ***CRIMINAL LAW:*** *Dangerous Drugs Act 1952 – Section 39B(1)(a) – Accused detained at airport – Bag carried contained 1669.8g of methamphetamine – Defence of innocent carrier – Whether defence probable*

The appellant, a Vietnamese, was detained at the Sultan Mahmud Airport, Kuala Terengganu ('airport'). According to the police officers, namely SP4 E and SP5, the appellant looked hesitant before she was stopped and detained. Upon inspection, the bag that she was carrying ('P8') was found to contain garments which were not appropriate to the heavy weight of P8. However, a closer inspection of P8 revealed a corner which had been prised opened and taped over. After prising P8 with a screwdriver, an envelope was found containing substances which were later confirmed by the chemist to be F methamphetamine weighing 1669.8g. The appellant was charged at the High Court for trafficking in dangerous drugs, an offence under s. 39B(1)(a) of the Dangerous Drugs Act 1952 ('DDA'). At the end of the prosecution's case, the High Court Judge ('HCJ') found the appellant to be in possession and trafficking of the drugs, by invoking the presumption under s. 37(da) of the G DDA. In doing so, the HCJ relied on inferences from the surrounding circumstances to conclude that the appellant had knowledge or, in other words, *mens rea* possession. The appellant was called to enter her defence. In her defence, the appellant submitted that (i) she came to Malaysia upon the request of her friend ('Nguyen') to look for a job and to find a suitor; H (ii) she was asked to travel to India first before going to Malaysia and had stayed at Nguyen's house in India; (iii) the wheels of her trolley bag were damaged and she bought P8; (iv) a day before her departure to Malaysia, Nguyen told her that P8 had a problem and had to be repaired; (v) P8 was returned to her on the night before she left for Malaysia; (vi) Nguyen would I meet up with her at the airport; and (vii) she had no knowledge of the drugs found in P8. At the conclusion of the trial, the appellant was found guilty and convicted for the offence and sentenced to death. Hence, the present appeal. In support of her appeal, the appellant submitted that the HCJ

(i) erred in finding that the appellant had possession and knowledge of the drugs found in P8; (ii) in drawing inferences, did not take into account she was travelling for the first time, did not know Bahasa Malaysia or English and was calm when SP4 and SP5 introduced themselves; and (iii) failed to consider that the appellant was simply an innocent carrier.

Held (dismissing appeal; affirming order of High Court)
Per Stephen Chung JCA (for the majority):

(1) The explanations in the appellant's narrative did not tally. She had the opportunity of examination but closed her eyes to the taped over damage in P8 and should have asked her friend about it. She did not. If a person deliberately shuts his/her eyes to the obvious, because he/she does not want to know, he/she is taken to know. Furthermore, she did not ask the police to try to contact Nguyen and Nguyen would have turned up if what she said was true. The appellant did not show nor produce any photograph of Nguyen or her telephone number to the police. These were not shown in the court either and these considerations raised questions about Nguyen. (paras 23 & 24)

(2) The appellant supposedly stayed at Nguyen's house in India and was supposed to meet her upon her arrival at the airport. This could not be possible unless Nguyen took an earlier flight from India or unless they were on the same flight, which would contradict the appellant's explanation that Nguyen would meet her at the airport. Nguyen's name was also not on the passenger list from Delhi to Kuala Lumpur International Airport ('KLIA'). (para 25)

(3) Evidence showed that the appellant bought her ticket, departing from KLIA to Ho Chi Minh City on 14 November 2013. This meant that she was in the country for six days only, from 9 to 14 November 2013, and could not be looking for work nor getting married in Malaysia. She did not have any work permit and did not tender evidence that she was getting married in Malaysia. All these inconsistencies pointed to her not being truthful about her journey to Kuala Terengganu or Malaysia. She could have flown directly from Ho Chi Minh City to KLIA instead of *via* India. (para 26)

(4) The HCJ did not err and there was no appealable error which required appellate intervention. The conviction was safe and there were no merits in the appeal. (para 28)

Per Harmindar Singh Dhaliwal JCA (dissenting):

(1) The appellant's conduct was at odds with the testimony of SP4 who told the court that, at the time of her detention, the appellant had behaved normally, was not alarmed and was calm. There were two inferences that could be made as to the conduct of the appellant at the time of her arrest to show her knowledge of the drugs. Under the law, both prior and subsequent conduct to the offence are relevant under s. 8(2) of the

A Evidence Act 1950. In such a case, where there are two or more inferences that could be made, the inference most favourable to an accused person must be adopted. (paras 8 & 9)

(2) The finding of the HCJ on *mens rea* possession through inferences could not be sustained. It was significant that the drugs were not visible to the B naked eye. They were well concealed and were only found after a concerted effort by SP4 and, that too, after using a screwdriver to prise open one corner of P8. It could not be said that the appellant had knowledge of the drugs. Merely having custody and control did not equate to knowledge. In fact, the conduct of the appellant in remaining C calm and fully cooperative with the police only served to disprove knowledge on her part. Without knowledge, the prosecution failed to establish the ingredient of *mens rea* possession. (para 10)

(3) The HCJ was in grave error when he evaluated the evidence of the prosecution and made the inference of knowledge based on the D appellant's conduct. The HCJ was fully aware that when custody and control is established, under s. 37(d) of the DDA, an accused may be deemed to have, in his possession, the drug and to have known the nature of such drug until the contrary is proved. Nevertheless, the presumption of possession and knowledge was not applied probably for E the reason that the presumption of trafficking under s. 37(da) was also applied and there was probably an awareness of the rule against the application of double presumptions on the part of the HCJ. (para 11)

(4) The finding of possession in the majority judgment was not displaced by the evidence of the appellant such that possession was proved beyond F reasonable doubt. There was more than sufficient evidence that appellant was in custody and control P8 which contained the drugs. In such a case, s. 37(d) of the DDA provides that where the fact of custody and control is proved, possession and knowledge of the drugs would be presumed. A *prima facie* case of presumed possession would then be G established as opposed to actual possession, which is the parlance used in some judgments. (para 13)

(5) There were merits in the appeal and appellate intervention was warranted. The conviction on the charge for trafficking was unsafe. Accordingly, the appeal was allowed. The conviction and sentence H passed by the High Court was set aside and substituted for possession under s. 12(1) and punishable under s. 39A(2) of the DDA. (para 15)

Bahasa Malaysia *Headnotes*

Perayu, seorang warganegara Vietnam, ditahan di Lapangan Terbang Sultan I Mahmud, Kuala Terengganu ('lapangan terbang'). Menurut pegawai polis, iaitu SP4 dan SP5, perayu kelihatan teragak-agak sebelum dia ditahan dan ditangkap. Selepas diperiksa, beg ('P8') yang dibawa oleh perayu didapati mengandungi pakaian yang tidak sesuai dengan keberatan P8. Walau

bagaimanapun, pemeriksaan teliti P8 mendedahkan satu sudut yang diumpil dan dibalut dengan perekat. Umpilan P8 dengan menggunakan pemutar skru menjumpai satu sampul berisi bahan yang kemudian disahkan oleh ahli kimia sebagai methamphetamine seberat 1669.8g. Perayu dituduh, di Mahkamah Tinggi, kerana mengedar dadah, satu kesalahan bawah s. 39B(1)(a) Akta Dadah Berbahaya 1952 ('ADB'). Pada penghujung kes pendakwaan, Hakim Mahkamah Tinggi ('HMT') mendapati perayu memiliki dan mengedar dadah, dengan membangkitkan anggapan bawah s. 37(da) ADB. Dalam berbuat demikian, HMT bersandar pada inferens berdasarkan hal-hal ikut keadaan untuk menyimpulkan perayu mempunyai pengetahuan atau, dalam kata lain, *mens rea* milikan. Perayu dipanggil membela diri. Dalam pembelaannya, perayu menghujahkan (i) dia datang ke Malaysia atas permintaan kawannya ('Nguyen') untuk mencari kerja dan jodoh; (ii) dia diminta ke India terlebih dahulu sebelum ke Malaysia dan telah menginap di rumah Nguyen di India; (iii) roda beg trolinya rosak dan dia membeli P8; (iv) sehari sebelum berlepas ke Malaysia, Nguyen memberitahunya P8 bermasalah dan perlu dibaiki; (v) P8 dikembalikan kepadanya pada malam sebelum dia berangkat ke Malaysia; (vi) Nguyen akan bertemu dengannya di lapangan terbang; dan (vii) dia tidak mempunyai pengetahuan tentang dadah yang dijumpai di dalam P8. Pada penutup perbicaraan, perayu didapati bersalah dan disabitkan atas kesalahan dan dijatuhkan hukuman mati. Maka timbul rayuan ini. Menyokong rayuannya, perayu menghujahkan HMT (i) terkhilaf dalam dapatan beliau bahawa perayu mempunyai milikan dan pengetahuan dadah yang dijumpai di dalam P8; (ii) dalam membuat inferens, tidak mengambil kira dia berjalan buat pertama kali, tidak tahu Bahasa Malaysia atau Inggeris dan tenang semasa SP4 dan SP5 memperkenalkan diri mereka; dan (iii) gagal mempertimbangkan perayu cuma seorang pembawa tidak bersalah.

Diputuskan (menolak rayuan; mengesahkan perintah Mahkamah Tinggi) Oleh Stephen Chung HMR (keputusan majoriti):

(1) Penjelasan-penjelasan dan naratif perayu tidak selari. Dia berpeluang memeriksa tetapi menutup matanya terhadap kerosakan yang berperekat dan sepatutnya bertanyakan pada kawannya tentang ini. Perayu tidak berbuat demikian. Jika seseorang, dengan sengaja, menutup mata terhadap perkara nyata, kerana dia tidak ingin tahu, dia dianggap tahu. Tambahan lagi, dia tidak meminta pihak polis cuba menghubungi Nguyen dan Nguyen mungkin muncul jika apa-apa yang perayu katakan adalah benar. Perayu tidak menunjukkan mahu pun mengemukakan apa-apa gambar Nguyen atau nombor telefon kepada pihak polis. Ini juga tidak dikemukakan di mahkamah dan pertimbangan-pertimbangan ini membangkitkan persoalan tentang Nguyen.

(2) Perayu kononnya menginap di rumah Nguyen, di India, dan kononnya akan bertemu dengan Nguyen setibanya di lapangan terbang. Ini tidak mungkin kecuali jika Nguyen mengambil penerbangan lebih awal dari

India atau jika mereka menaiki pesawat sama, yang akan bercanggah dengan penjelasan perayu bahawa Nguyen akan bertemu dengannya di lapangan terbang. Nama Nguyen juga tidak tersenarai dalam senarai penumpang dari Delhi ke Lapangan Terbang Kuala Lumpur ('KLIA').

(3) Keterangan menunjukkan perayu membeli tiketnya berlepas dari KLIA ke Bandar Ho Chi Minh pada 14 November 2013. Ini bererti dia berada di Malaysia selama enam hari sahaja, iaitu dari 9 hingga 14 November 2013, dan tidak mungkin mencari kerja atau berkahwin di Malaysia. Dia tidak mempunyai apa-apa permit pekerjaan dan tidak mengemukakan keterangan dia akan berkahwin di Malaysia. Kesemua percanggahan ini menunjukkan perayu tidak jujur tentang perjalanannya ke Kuala Terengganu atau Malaysia. Dia mungkin mengambil penerbangan dari Bandar Ho Chi Minh ke KLIA dan bukan melalui India.

(4) Hakim Mahkamah Tinggi tidak terkhilaf dan tiada kekhilafan boleh-rayu yang mewajarkan campur tangan rayuan. Sabitan selamat dan tiada merit dalam rayuan.

Oleh Harmindar Singh Dhaliwal HMR (menentang):

(1) Tingkah laku perayu berselisih dengan keterangan SP4 yang menyatakan di mahkamah, semasa penahanannya, perayu bertindak normal, tidak terkejut dan tenang. Terdapat dua inferens yang boleh dibuat tentang tingkah laku perayu semasa penahanannya untuk menunjukkan pengetahuan dadah. Bawah undang-undang, tingkah laku sebelum dan selepas kesalahan relevan bawah s. 8(2) Akta Keterangan 1950. Dalam kes sedemikian, jika terdapat dua atau lebih inferens yang boleh dibuat, inferens yang memihak pada tertuduh akan diguna pakai.

(2) Dapatan HMT tentang milikan *mens rea* melalui inferens tidak boleh dikekalkan. Penting bahawa dadah tersebut tidak boleh dilihat dengan mata kasar. Dadah tersebut disembunyikan dengan rapi dan hanya dijumpai selepas usaha padu SP4 dan, itu pun, selepas menggunakan pemutar skru untuk mengumpil satu sudut P8. Perayu tidak boleh dikatakan mempunyai pengetahuan tentang dadah tersebut. Sekadar mempunyai milikan dan kawalan tidak boleh disamakan dengan pengetahuan. Malah, tingkah laku perayu yang kekal tenang dan bekerjasama penuh dengan pihak polis menidakkan pengetahuannya. Tanpa pengetahuan, pihak pendakwaan gagal membuktikan inti pati *mens rea* milikan.

(3) Hakim Mahkamah Tinggi melakukan kekhilafan besar apabila beliau menilai keterangan pihak pendakwaan dan membuat inferens pengetahuan berdasarkan tingkah laku perayu. Beliau sedar bahawa apabila jagaan dan kawalan terbukti, bawah s. 37(d) ADB, seorang tertuduh dianggap mempunyai dadah dalam milikannya dan tahu akan sifat dadah tersebut hingga terbukti sebaliknya. Namun begitu, anggapan

milikan dan pengetahuan mungkin tidak diguna pakai kerana anggapan pengedaran bawah s. 37(da) juga diguna pakai dan mungkin HMT tersedar tentang peraturan melarang pemakaian anggapan berganda.

(4) Dapatan milikan dalam penghakiman majoriti tidak tersingkir oleh keterangan perayu bahawa milikan berjaya dibuktikan atas keraguan munasabah. Terdapat keterangan yang memandai bahawa perayu mempunyai jagaan dan milikan P8 yang mengandungi dadah. Dalam kes sebegini, s. 37(d) ADB memperuntukkan bahawa jika fakta jagaan dan kawalan terbukti, anggapan milikan dan pengetahuan tentang dadah timbul. Kes *prima facie* anggapan milikan kemudian dibuktikan berbanding milikan sebenar, iaitu bahasa yang digunakan dalam beberapa penghakiman.

(5) Terdapat merit dalam rayuan dan campur tangan rayuan adalah wajar. Sabitan terhadap pertuduhan pengedaran tidak selamat. Oleh itu, rayuan dibenarkan. Sabitan dan hukuman Mahkamah Tinggi diketepikan dan diganti dengan milikan bawah s. 12(1) dan boleh dijatuhkan hukuman bawah s. 39A ADB.

Case(s) referred to:
Alma Nudo Atenza v. PP & Another Appeal [2019] 5 CLJ 780 FC ***(refd)***
Ghasem Hozouri Hassan v. PP [2018] 6 CLJ 133 FC ***(refd)***
Ibrahim Mohamad & Anor v. PP [2011] 4 CLJ 113 FC ***(refd)***
Mohamad Radhi Yaakob v. PP [1991] 3 CLJ 2073; [1991] 1 CLJ (Rep) 311 SC ***(refd)***
Muhammed Hassan v. PP [1998] 2 CLJ 170 FC ***(refd)***
Munuswamy Sundar Raj v. PP [2016] 1 CLJ 357 FC ***(refd)***
PP v. Herlina Purnama Sari [2016] 1 LNS 6 CA ***(refd)***
PP v. Li Qian [2018] 7 CLJ 557 CA ***(refd)***
PP v. Mohd Radzi Abu Bakar [2006] 1 CLJ 457 FC ***(refd)***
PP v. Siti Nurhidayah [2018] 9 CLJ 720 CA ***(refd)***
Sochima Okoye v. PP [1995] 3 CLJ 371 CA ***(refd)***
Venkatesan Chinnasami v. PP [2011] 1 LNS 1736 CA ***(refd)***
Yee Wen Chin v. PP Another Appeal [2008] 6 CLJ 773 CA ***(refd)***

Legislation referred to:
Dangerous Drugs Act 1952, ss. 12(1), 37(d), (da), 39A(2), 39B(1)(a), (2)
Evidence Act 1950, s. 8(2)

For the appellant - Ghazali Ismail; M/s Ghazali Ismail & Co
For the respondent - Dhiya Syazwani Izyan Mohd Akhir; DPP

[Editor's note: Appeal from High Court, Kuala Terengganu; Criminal Trial No: 45A-07-06-2014 (affirmed).]

Reported by Najib Tamby

A

JUDGMENT

Stephen Chung JCA (majority):

The Appeal

[1] The appellant was charged for trafficking in dangerous drugs under the B Dangerous Drugs Act 1952 (DDA). The charge reads as follows:

> Bahawa kamu pada 9/11/2013 lebih kurang jam 9.30 pagi, bertempat di Pintu Keluar Balai Ketibaan Domestik, Lapangan Terbang Sultan Mahmud, di dalam Daerah Kuala Terengganu, di dalam Negeri Terengganu, telah memperedarkan dadah berbahaya iaitu C Methamphetamine seberat 1669.8 gram, dan dengan itu kamu telah melakukan suatu kesalahan di bawah seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 (Akta 234) yang boleh dihukum di bawah seksyen 39B(2) Akta yang sama.

[2] After a trial, the appellant was found guilty, convicted and sentenced D in accordance with the law. The appellant had appealed against the conviction and sentence.

The Facts Of The Case

[3] On 9 November 2013, the appellant arrived at the Kuala Terengganu E Airport *via* a transit flight from Kuala Lumpur. SP4 and SP5 saw the appellant walking slowly, looking to the left and right, with hesitation and carrying a large bag (P8). SP5 followed the appellant and gave a gesture to SP4. They detained and instructed the appellant to bring the bag to a room for inspection. They found some lady garments which were not proportionate to the heavyweight of the bag. Upon close inspection, they saw F a corner of the bag which had been prised opened and cello-taped over. After prising with a screwdriver at the said corner, they found a brown envelope. After removing the inside lining of the bag, another envelope was found. Both envelopes contained crystalline substance suspected to be dangerous drugs. The government chemist (SP3) analysed the substance and found it G contained 1669.8g of methamphetamine. The learned judge found the appellant to be in possession and trafficking in the said drug by invoking the presumption under s. 37(da) of the Act and called upon the appellant to present her defense.

[4] The appellant testified that she came to Malaysia upon the request of H her friend by the name of Nguyen Thih Thanc Truc to look for a job and to find a suitor. She was asked to travel to India first before going to Malaysia and had stayed at her friend's house in India. She said the wheels on her trolley bag were damaged and her friend brought her to buy a new luggage bag (P8). One day before departure to Malaysia, her friend told her that the I new bag had a problem and had to be repaired. She said the bag was returned to her on the night before she left for Malaysia. The appellant said she had no knowledge of the dangerous drugs found in the bag.

The Appellant's Submission

[5] The appellant submitted that the learned High Court Judge had erred in finding that the appellant had possession and knowledge of the drugs which were found in the bag. It was submitted that since the appellant was carrying the bag at the airport, custody and control of the bag was not an issue in this appeal. However, the question was whether the appellant had knowledge of the drugs in the bag.

[6] The appellant submitted that she was travelling to Terengganu for the first time and did not know the Malay or English language and could not read the signs at the airport. The appellant contended that her friend would be waiting for her at the Kuala Terengganu Airport but she could not contact her friend because of her low cellphone battery. It was submitted that when SP4 and SP5 introduced themselves as police, she looked normal, not surprised but calm and followed their instructions. It was submitted that her demeanour of looking hesitant was consistent with what SP5 had described. Unfortunately the learned High Court Judge failed to consider these facts in drawing the inference that the appellant had knowledge because of her demeanour. If these were taken into account, the learned judge would have drawn some other inferences that she had no knowledge of the drugs.

[7] It was submitted that the learned High Court Judge failed to consider that the appellant was simply an innocent carrier. The appellant had explained that the bag was given to her to replace her damaged bag before leaving for Malaysia. It was submitted that the drugs were concealed so thoroughly that only after careful checks could the drugs be found. It was submitted that SP4 used the screwdriver to open the compartment used to hide the drugs inside the bag. It was submitted that she only carried out an ordinary inspection of the bag when the bag was handed to her and she did not suspect anything nor did she suspect that her friend would conceal the drugs in the bag. The appellant submitted that her friend was the real trafficker and she was an innocent carrier. It was submitted that the prosecution had failed to prove its case beyond reasonable doubt against the appellant and that she should be acquitted and discharged.

The Prosecution's Submission

[8] The learned judge had found that the appellant had the knowledge and possession of the dangerous drugs found in the bag and correctly invoked the presumption under s. 37(da) of the Act that the appellant was trafficking in the drugs and based on the large quantity of drugs found to be in the possession of the appellant.

[9] The learned judge was correct in rejecting the appellant's defense and found that the character Nguyen Thih Thanh Truc was a mere "fictitious character" and no '*Alcontara* notice' was given by the appellant. Further, no information was provided regarding the address of the Nguyen either in Vietnam or in India.

[10] The learned judge also found that the appellant was not an innocent carrier because the doctrine of willful blindness was applicable to her when the appellant did not check the contents of the bag and she had enough time and opportunity to do so. The manner in which the drugs were hidden and the weight of the bag was not proportionate to the contents of her garments.

Our Decision

[11] On evidence, the appellant travelled from Vietnam *via* India, on transit at KLIA, and arrived at the Kuala Terengganu Airport on 9 November 2013 at about 9.10am where she was seen carrying the bag (P8) exiting the airport terminal building. She was detained by SP4 and SP5 and the drugs were found concealed in the bag. The learned judge found the appellant to be in custody and control of the bag and that based on the drugs found concealed in the bag, which she took from India to Malaysia, that she had knowledge of and the nature of the drugs in the bag. The learned judge found that the appellant was in possession of the drugs and invoked the presumption under s. 37(da) of the Act that she was trafficking in the drugs. After hearing the defense, the learned judge found that the appellant had failed to rebut the presumption of trafficking and failed to raise any reasonable doubt in the prosecution's case. The appellant was then convicted and sentenced according with the law.

[12] On the facts, it was not in dispute that the appellant had custody and control of the bag which contained the drugs. Counsel for the appellant had conceded as much that the appellant was carrying the bag at the airport and had custody and control of the bag and that this was not an issue in the appeal.

[13] However, the appellant submitted that she had no knowledge of the drugs which were well-concealed in the bag which was only given to her by her friend on the night of her departure from India to KLIA. The appellant contended that she was an innocent carrier and that her friend was the real trafficker of the drugs. We shall deal with these issues.

[14] In *Venkatesan Chinnasami v. PP* [2011] 1 LNS 1736, the Court of Appeal put it aptly that a defense of innocent carrier referred to a state of affairs where an accused person acknowledged carrying a bag containing the drugs but disputed having knowledge of the drugs and whether the defense would succeed or not would very much depend on the facts of each case. This is a matter that falls within the realm of the trial judge and an appellate court will be slow to interfere with the finding of facts of the trial judge unless it is plainly wrong.

[15] It has been held that ignorance *simpliciter* is not sufficient to let an accused person off the hook as otherwise every other accused person will invoke that defense. It needs more than that. Ignorance may be a good defense when there is no reason for suspicion and no right or opportunity for

examination. The defense of innocent carrier must necessarily bring in the concept of willful blindness: *Munuswamy Sundar Raj v. PP* [2016] 1 CLJ 357; [2015] 6 MLJ 214.

[16] The evidence showed that on 16 October 2013, the appellant left Vietnam for India where she stayed with her friend. She left Delhi on 8 November 2013, arriving at KLIA on 9 November 2013 at about 7am on transit, and arriving at the Kuala Terengganu airport on the same day at about 9.10am where she was arrested with the bag and the drugs (see P27(b)). According to SP2, the bag was checked in from Delhi *via* KLIA to Kuala Terengganu. There was no allegation and no evidence that the bag was tampered with during the journey.

[17] We referred to the testimony of SP4 who testified that the appellant was the last person from the flight to leave the terminal carrying the bag, after the other passengers had left. She looked hesitant, looking left and right. He, together with SP5, stopped the appellant, checked her passport and instructed her to follow them to a room to inspect her bag. Since she had a Vietnamese passport, SP4 decided to speak in English and was not sure whether she could speak English but the appellant was able to follow their instructions. He instructed her to open the bag for inspection. He saw some female garments in the bag and took them out. He lifted the bag, it felt heavy and he suspected it contained something else because the garments were not heavy. He made a visual inspection inside of the bag which did not alert him of anything suspicious. He then made a more detailed examination of the interior of the bag. At a corner, at the bottom of the bag, he saw as if it was damaged and taped over. He lifted the tape and used a screwdriver to prise open that part of the bag and saw what looked like a brown envelope. He priced open further and removed the envelope which was covered with brown tape. He then found and removed a second similar envelope. On inspection, they contained crystalline substance which SP3 found to be methamphetamine. These facts were not in dispute.

[18] The appellant denied that the drugs belonged to her and she had no knowledge of the drugs which were found in the bag. She said the bag was only given to her by her friend on the night she left for KLIA. She only had a quick look of the interior of the bag and she did not suspect anything because Nguyen Thih Thanh Truc was her good friend who would meet her when she arrived at the Kuala Terengganu airport. She submitted that she was not able to contact this friend upon arrival because of low phone battery. It was submitted that she was in no position to know of the drugs which were so well-concealed unless she used a screwdriver. The appellant relied on the case of *PP v. Li Qian* [2018] 7 CLJ 557 to support her contention that she was an innocent carrier and not the trafficker.

[19] We were referred to several cases on the defense of innocent carrier. Each case must be read based on the facts of each case. In *PP v. Li Qian (supra)*, the drugs were completely hidden behind the metal pull of the luggage which were not noticeable to her even if the luggage was opened. The trial judge found her a witness of truth and her evidence to be credible. Also she was not cross-examined if she had any suspicion or made any attempt to check the luggage carefully. The trial judge found that the respondent had succeeded in her defense and was acquitted and discharged. The appeal to the Court of Appeal was dismissed. In *PP v. Herlina Purnama Sari* [2016] 1 LNS 6; [2016] 2 MLJ 724, the accused claimed that she worked for an Indonesian woman by the name of Vivian who asked her to go to meet Vivian's friend (Jo) to collect some things before proceeding to Laos. She claimed she was given her new luggage and a plastic bag to be given to Jo's friend in Laos. Without any suspicion, she put the plastic bag inside the luggage. The evidence showed that Vivian was arrested by the Indonesian authority in connection with a drug-related offence. The trial judge found that her defense was neither a bare denial nor an afterthought which had been put to the prosecution's witnesses. The prosecution's appeal was dismissed. Similarly, in *PP v. Siti Nurhidayah* [2018] 9 CLJ 720; [2019] 1 MLJ 794, the respondent in that case claimed that she brought the bag on the instruction of her friend Tina (Titin Sukmawati) who later testified as DW2 that she was the Tina referred to. The trial judge found that she had raised a reasonable doubt in the prosecution's case and acquitted and discharged her. The prosecution's appeal was dismissed.

[20] However, many were confused or misconstrued the *Radhi* direction, that it was about who is the real trafficker. In *PP v. Siti Nurhidayah (supra)*, the Court of Appeal referred to the decision of Gopal Sri Ram JCA (as he then was) in *Yee Wen Chin v. PP* [2008] 6 CLJ 773; [2008] 6 MLJ 222 CA which explained the directions given in *Mohamad Radhi Yaakob v. PP* [1991] 3 CLJ 2073; [1991] 1 CLJ (Rep) 311; [1991] 3 MLJ 169, relying on his own decision in *Sochima Okoye v. PP* [1995] 3 CLJ 371; [1995] 1 MLJ 538, where it was held that in that case (*Radhi*'s case) it was 'an authority for the proposition that a person charged with trafficking was entitled to an acquittal on that charge by showing that he was a mere possessor of the drugs whilst another was the true trafficker. Whenever such a defense is taken, two separate exercises must be carried out by the trial judge. He must first determine as a fact whether that other is a real person or a mere figment of the accused's imagination invented for the purpose of the trial. Next, if he finds that other person to be real the judge must then determine whether that other person is the real trafficker. This is called the *Radhi* direction and must be administered by a court unto itself when such a defence is taken'.

[21] The apex court in *Ghasem Hozouri Hassan v. PP* [2018] 6 CLJ 133 had ruled that both the above cases are instances where the Court of Appeal had misconstrued what the then Supreme Court meant by separate exercise. The apex court was of the view that the separate exercise is surely not an exercise

to determine the real trafficker, but as stated in *Mohamad Radhi*, the separate exercise is an exercise by the court to consider whether on a balance of probabilities on the evidence, the defense has rebutted the statutory presumption of trafficking as a separate exercise even though the court is satisfied on a balance that the presumption of possession has not been rebutted. Therefore the case of *PP v. Siti Nurhidayah* (*supra*) must be read in the light of the decision in *Ghasem Hozouri Hassan v. PP* (*supra*).

[22] Coming back to the facts of this case, SP4 after finding that the few garments in the bag were not proportionate to the weight of the bag, he became suspicious and carried out a more detailed examination of the bag where he saw some damage taped over at a corner of the bottom of the bag. He lifted the tape and used the screwdriver to prise it open and discovered the envelopes containing the drugs. On the evidence that the appellant flew from India *via* KLIA to Kuala Terengganu with the bag containing the drugs, the learned judge was entitled to infer that she had the knowledge and the nature of the drugs in the bag. If the appellant had carried out a more careful examination, she would have seen the taped over damage to the inside of the bag and this would have alerted her suspicion.

[23] The appellant explained that the wheels to her trolley bag were damaged and her friend took her to buy a new bag. She inspected the bag before she bought it and did not complain of any damage and there should not be any damage to the inside of the new bag. She said it was her friend who told her there was a problem with the new bag and took it for repair. She said she managed to have a quick inspection because the new bag was only given to her on the night before departure for KLIA. She did not say what time and how much time before she departed for KLIA. Looking at her narrative, her explanations did not tally. She had the opportunity of examination but she closed her eyes to the taped over damage in the new bag and should have asked her friend about it. She did not. If a person deliberately shuts his/her eyes to the obvious, because he/she does not want to know, he/she is taken to know: as per Professor Glanville Williams cited in *Munuswamy Sundar Raj v. PP (supra)*.

[24] Further, she said her friend asked her to come to Kuala Terengganu, Malaysia to look for work and to find a suitor and that this friend would meet her at the airport upon her arrival. She said she could not contact her friend due to the telephone's low battery. However, she did not ask SP4 or SP5 to try to contact her friend and her friend would have turned up anyway if what she said was true. The appellant did not show nor produce any photograph of her friend or her telephone number to SP4 and SP5. These were not shown in court (see D33). These considerations raised questions about her friend Nguyen Thih Thanh Truc.

[25] The appellant supposedly stayed with this friend in India who gave her the bag the night before her departure for KLIA and was supposed to meet her upon her arrival at the Kuala Terengganu airport. This could not be possible unless her friend took an earlier flight from India in order to meet her in Kuala Terengganu or unless they were on the same flight which again would contradict her explanation that this friend would meet her at the Kuala Terengganu airport. The name of Nguyen Thih Thanh Truc was not in the passenger list from Delhi to KLIA (see D9).

[26] The evidence showed that the appellant had bought her ticket departing from KLIA to Ho Chi Minh City on 14 November 2013 (see P27(a)). This meant she was in the country for only six days, from 9 to 14 November 2013, and could not be looking for work nor getting married in the country. She did not have any work permit and did not tender evidence that she was getting married in the country. Again her explanations did not tally.

[27] All these inconsistencies pointed to her not being truthful about her journey to Kuala Terengganu or to Malaysia. She could have flown directly from Ho Chi Minh City to KLIA instead of *via* India. Of course according to her, she was to meet with this friend in India who gave her the bag. The learned judge found Nguyen Thih Thanh Truc to be a fictitious person and that the appellant was not credible. These were findings of facts. The learned judge also found that her explanations did not rebut the presumption nor raised any reasonable doubt in the prosecution's case and that the prosecution had proven its case against the appellant under the charge beyond reasonable doubt.

[28] On the evidence before us, Justice Umi Kalthum binti Abdul Majid and I by a majority decision, found that the learned judge did not err and there was no appealable error which required appellate intervention. We were of the view that the conviction was safe and there were no merits in the appeal. The appeal was dismissed and we affirmed the order of the High Court.

Harmindar Singh Dhaliwal JCA (dissenting):

[29] The appellant is a Vietnamese national. She was charged at the Kuala Terengganu High Court with trafficking in dangerous drugs, namely, 1669.8g of methamphetamine which was an offence under s. 39B(1)(a) of the Dangerous Drugs Act 1952 ("the Act") and punishable under s. 39B(2) of the same Act. The offence was said to be committed at the Domestic Arrival Hall of Sultan Mahmud Airport in Kuala Terengganu on 9 November 2013.

[30] After a trial, the appellant was found guilty, convicted and sentenced to death by the High Court on 27 March 2017. The appellant then filed this appeal.

[31] The appeal was heard on 19 April 2019. At the conclusion of the submissions, the appeal was dismissed by a majority decision. Although I was in agreement with my learned sister and brother on most of the issues raised, I had, with respect, serious reservations on whether the learned trial judge was right that the prosecution had established the element of *mens rea* possession. I am therefore compelled to provide reasons for my dissenting view which now follow.

At The High Court

[32] The facts leading to the arrest of the appellant are set out in the majority judgment of Stephen Chung JCA and I am grateful for not having to repeat the same. In essence, the appellant was arrested at the Kuala Terengganu airport after she was found to have in her luggage bag dangerous drugs later ascertained by the chemist to be 1669.8g of methamphetamine. The drugs were found in a corner of bag which appeared to have been opened and then sealed back with tape. It was SP4 who, after a detailed examination of the bag, found some damage at the corner of the bag. He then used a screwdriver to prise open the taped over-corner and discovered the envelopes with the incriminating drugs inside.

[33] The learned trial judge correctly found that the appellant had custody and control of the bag. However, in order to prove knowledge, the learned judge appeared to rely on inferences from the surrounding circumstances to conclude that the appellant had knowledge or in other words *mens rea* possession. The learned judge then invoked the presumption of trafficking under s. 37(da) of the Act based on the quantity of drugs and considered that a *prima facie* case had been established. The appellant was then ordered to enter her defence.

The Appeal

[34] This finding of *prima facie* was assailed by learned counsel for the appellant. It was argued that there was insufficient direct or circumstantial evidence for the learned judge to conclude that the appellant had knowledge.

[35] In this respect, the learned judge appeared to rely on the conduct of the appellant to arrive at the conclusion that the appellant had knowledge. This is how the learned judge put it (at p. 25 appeal record, vol. 1):

> 32. Berkaitan dengan elemen pengetahuan jelas bahawa semasa OKT keluar beliau dalam keadaan seperti teragak-agak dan sentiasa melihat ke kiri dan ke kanan. Ini menunjukkan OKT sememangnya mengetahui di dalam penjagaannya dan kawalannya beg [P8] mengandungi dadah.

[36] However, this view of the appellant's conduct was at odds with the testimony of SP4 who told the court that at the time of her detention, the appellant had behaved normally, was not alarmed and was calm. The evidence of SP4 at the trial was as follows (appeal record vol. 1 at p. 138):

> S: Bila kamu cakap pada sasaran macam itu kamu nampak atau tidak apa reaksi sasaran suspek tersebut?

A J: Saya dapati sasaran dalam keadaan biasa, tidak terkejut apa-apa, tenang dan ikut saya arahankan.

[37] It was, therefore, at least clear that two inferences could be made as to the conduct of the appellant at the material time of her arrest to show her knowledge of the impugned drugs. There is no question that under the law, B both prior and subsequent conduct to the offence are relevant under s. 8(2) of the Evidence Act 1950. In such a case, it is trite law that where there are two or more inferences that could be made, the inference most favourable to an accused person must be adopted (see *Ibrahim Mohamad & Anor v. PP* [2011] 4 CLJ 113; *PP v. Mohd Radzi Abu Bakar* [2006] 1 CLJ 457).

C **[38]** In the circumstances, the finding of the learned judge on *mens rea* possession through inferences cannot be sustained. It was significant that the impugned drugs were not visible to the naked eye. They were well concealed and were only found after a concerted effort by SP4 and that too after using a screwdriver to prise open one corner of the bag. It could not be said, by D any stretch, that the appellant had knowledge of the drugs. Merely having custody and control does not equate to knowledge. In fact, the conduct of the appellant in remaining calm and fully cooperative with the police only served to disprove knowledge on her part. Without knowledge, the prosecution had failed to establish the ingredient of *mens rea* possession.

E **[39]** In my view, the learned judge was in grave error when he evaluated the evidence of the prosecution and made the inference of knowledge based on the appellant's conduct. Now, the learned judge was fully aware that when custody and control is established, under s. 37(d) of the Act, an accused may be deemed to have in his possession the drug and to have known the nature F and the nature of such drug until the contrary is proved (see para. [30] of the grounds of judgment). Nevertheless, the presumption of possession and knowledge was not applied probably for the reason that the presumption of trafficking under s. 37(da) of the Act was also applied and there was probably an awareness of the rule against the application of double presumptions on G the part of the learned judge (at that time *Muhammed Hassan v. PP* [1998] 2 CLJ 170 was applicable).

[40] There was also no submission by the prosecution that possession and knowledge was established through the invocation of the presumption under s. 37(d) of the Act. Instead, before this court, they dug in their heels to H maintain their position that knowledge had been proved by inferences from the surrounding circumstances and argued that the learned judge was right in his finding.

[41] Be that as it may, there was more than sufficient evidence that the appellant was in custody and control of the bag which contained the drugs I which formed the subject matter of the charge. In such a case, the law provides *vide* s. 37(d) of the Act that where the fact of custody and control is proved, possession and knowledge of the dangerous drug will be presumed. A *prima facie* case of presumed possession would then be established as

opposed to actual possession which is the parlance used in some judgments. For the reasons given by my learned brother Stephen Chung JCA, the finding of possession was not displaced by the evidence of the appellant such that possession was proved beyond reasonable doubt.

[42] As it is now settled through the recent judgment of the Federal Court in *Alma Nudo Atenza v. PP & Another Appeal* [2019] 5 CLJ 780 that the presumption of trafficking cannot be applied together with the presumption of possession, it will not be permissible to convict the appellant on the charge of trafficking by use of the presumption as was done by the learned trial judge in the present case.

Conclusion

[43] Given the circumstances, and for the reasons given, there were merits in the appeal and appellate intervention was warranted. The conviction on the charge for trafficking was unsafe. Accordingly, the appeal was allowed. The conviction and sentence passed by the High Court was set aside and substituted with conviction for possession under s. 12(1) and punishable under s. 39A(2) of the Act.